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ABSTRACT

The constitutional basis for laws concerning rights of the handicapped lies in the Fourteenth Amendment's equal protection and due process clauses. Recent litigation has been based on Section 504 of the 1973 Rehabilitation Act, P.L. 94-142. Significant court decisions affecting education have been handed down in five areas. Regarding right to free education, the courts have held that public schools cannot exclude children from school nor charge them extra tuition for special programs. Regarding right to an appropriate education, courts have held that the schools must identify all handicapped students and provide them an appropriate education. In the area of disciplinary exclusion, cases challenging the expulsion of handicapped students have generally ended in requiring schools to offer alternative placement to the students. Regarding the right to the least restrictive alternative, courts have maintained that a handicapped child cannot be excluded from the regular classroom or from regular extracurricular activities if otherwise qualified. In a case regarding discrimination against handicapped school employees, the Third Circuit Court upheld a lower court decision that struck down a school district policy of not hiring blind persons. These cases appear to produce more questions than answers, especially concerning the recourse available when rights are denied. (Author/JM)

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Floyd G. Delon
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LITIGATION ON RIGHTS OF THE HANDICAPPED IN EDUCATION

Fellow Educators:

Although significant court decisions dealing with rights of the handicapped were not rendered until the 1970's, the philosophical basis for these decision dates back to the nations's early history. The Declaration of Independence proclaimed that "all men are created equal." In the 1830's, the Frenchman, Alexis de Tocqueville in his Democracy in America, noted the obvious preoccupation of American political thought with the concept of "equality." He also very astutely observed that "scarcely any political questions arises in the United States which is not resolved, sooner or later, into a judicial question."

The constitutional basis for the political ideal of equality was established with the adoption of the Fourteenth Amendment's equal protection clause. But the momentum of judicial implementation of this principle, sometime referred to as egalitarianism, did not develop until modern times under the Warren Court. Equal protection for the handicapped is an extension of this movement in which the courts first gave attention to racial inequality and then to sexual inequality.

While the education is not a fundamental right guaranteed by the Constitution, the states' decision to provide public education created a "property" interest that under the Fourteenth Amendment may not be denied without due process of law. This provision also protects an individual's "liberty" interest which may be adversly affected, for example, by improper placement, classification or labeling.

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The litigation of the early 1970's involved claims charging violation of these Fourteenth Amendment provisions, i.e., equal protection and due process. Since then, the advocates of rights of the handicapped frequently base their cases on recent state legislation and in the past year or so on Section 504 of the 1973 Rehabilitation Act, P.L. 94-142 and the Civil Rights Act of 1871. We will examine some of the significant court decisions in five areas: (1) Right to free education; (2) Right to appropriate education; (3) Disciplinary exclusion; (4) Right to the least restrictive alternative; and (5) Right to employment

(1) Right to Free Education

The "ground breaking" decision was the widely publicized Pennsylvania Associations for Retarded Children v. Commonwealth of Pennsylvania (343 F. Supp. 279), in 1971. In this case, the Association successfully challenged a state statute that permitted school directors to "refuse to accept or retain beginners who have not attained a mental age of 5 years." A consent decree provided that each child shall be accorded access to a program of education and training and that an opportunity for a hearing shall be accorded before any change in the educational assignment of mentally retarded children.

The following year in Mills v. Board of Education (348 F. Supp. 866), the federal district court in the District of Columbia held:

> no child eligible for a publicly supported education . . .
> shall be excluded from a regular public school . . .
> unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate hearing and periodic review of the child's status, progress, and

adequacy of any educational alternative.

Although these decision were not binding outside the jurisdiction of these courts, state legislatures and eventually the Congress, moved to enact statutes to implement the provisions of these rulings.

The issue of the right to "free" education for the handicapped is still receiving the attention of the courts. For example, in Elliot v. Chicago Board of Education (47 U.S.L.W. 2187), an opinion rendered September, 1978, the court ruled that a statute limiting to $2500 the amount of tuition a school district could pay for the placement of a handicapped child in a non-public school violative of the Illinois Constitution. Citing the constitutional mandate for free public schools, the court said:

> It is the court's opinion that the legislature has established the education of handicapped students as a part of the responsibility of the public school system. Furthermore, the education of handicapped students in private special education facilities is also a program established as a part of the school system. So established, such education must be free of tuition charges through the secondary level.

(2) Right to Appropriate Education

Parents and advocacy groups have been active in seeking judicial enforcement of the right of handicapped children to be identified and provided appropriate education. In a 1977 case, Panitch v. Wisconsin (444 F. Supp. 320), a successful class action resulted in the issuance of an injunction ordering schools to so comply. The court held that failure to act denied equal protection of the laws in violation of the Fourteenth Amendment.

This issue was also litigated in Pennsylvania in 1976. You may have read of the case, Frederick L. v. Thomas (419 F. Supp. 980), in which the federal district court ordered the Philadelphia school system to identify all learning disabled students and provide appropriate education for them. The court rejected arguments of the school district that it could do no more than it was already doing because the legislature failed to provide any additional funding to meet this statutory mandate. Subsequently, the Third Circuit Court affirmed the district court decision. The dispute reached this court once more in 1978. The court again affirmed the lower court decision, in this instance, to leave questions of determining damages to the state courts, (47 U.S.L.W. 2005).

(3) Disciplinary Exclusions

The basic question which has arisen in recent months is: Does the school district's obligation to provide free, appropriate education preclude the expulsion of handicapped students for disciplinary reasons?

During 1976 and 1977, three cases challenging the expulsion of handicapped students were filed in the federal district courts (Davis v. Wynne, No. CV-176-44, S.D. Ga.; Donnie R. v. Wood, No. 77-1360, D.S.C.; and Kenneth J. v. Kline, No. 77-2257, E.D., Pa.). The first case resulted in an out-of-court settlement calling for appropriate alternative placement. The other two were resolved with consent decrees in which the plaintiffs succeeded in getting expulsion treated as a change in placement which required all procedural safeguards provided by state and federal legislation.

The most authoritative decision to date is Stuart v. Nappi (443 F. Supp. 1235, 1978). The plaintiff, a high school student suffering from learning disabilities and mental retardation, was successful in an action brought requesting a preliminary injunction preventing the school from con-

ducting a hearing to expel her. The court said:

> The expulsion of handicapped children not only jeopardizes their right to an education in the least restrictive environment, but is inconsistent with procedures established by the Handicapped Act.

The court ordered a review of her special education program, enjoined any hearing to expel her, and declared that any change in placement must be in accordance with procedures required by the act.

Last July, in an administrative proceeding, the Iowa State Department of Education considered a dispute centering on the attempted expulsion of an eighteen-year-old learning disabled student for violating the school's no smoking rule. The principal had to climb into the suspended ceiling of the boys restroom to catch him, but that is immaterial to the decision. The department followed the rationale of Stuart v. Nappi in directing school administrators to stop efforts to expel the boy. If they so elected, the process for alternative placement was available to them.

(4) Right to the Least Restrictive Alternative

The concept of the "least restrictive alternative" is relatively new to education law and serves as a basis for the "mainstreaming" requirement. It is a legal principle deeply rooted in court decisions on involuntary confinement under both civil and criminal laws.

For example, in a 1974 case, Welsch v. Likins (373 F. Supp. 487), six retarded patients in Minnesota sued the state. They contended that their involuntary commitment violated their Fourteenth Amendment rights. Their claim maintained that the state failed to provide any program of habilitation, i.e., individualized treatment, education and training and that the state was obligated to seek out and develop less restrictive, community based alternatives. In holding for the plaintiffs, the court said:

Hospitalization only as a last resort is the essence of the plaintiffs' claim to the right of the least restrictive alternative. The root of the plaintiffs' arguments is that mentally defective persons who have not committed any criminal acts "cannot be deprived of their liberties if there is less drastic means" for achieving the same basic goals of protecting and treating them.

The newspapers gave fairly wide coverage to the recent federal district court decision in Pennsylvania, Halderman v. Pennhurst State School (446 F. Supp. 1295, 1978). The court ruled that institutionalizing retarded persons without providing minimally adequate habilitation violates their rights under the Eighth and Fourteenth Amendments, state and federal statutes. The court went on to hold that they could not receive such habilitation at Pennhurst. A court appointed "special master" is responsible for devising a plan for returning the mentally retarded person to their home communities and for providing the services.

Now, the concept of the least restrictive alternative is very much a part of education law. In a 1976 West Virginia case, Hairston v. Drosick (423 F. Supp. 180), parents of a spina befida child were successful in obtaining a court order placing her in the regular classroom. The child had a noticeable limp and suffered from incontinence of the bowels. School officials had offered homebound instruction or enrollment in a class for the orthopedically handicapped. In the opinoin of the court, exclusion of the child from the regualr classroom violated §504 and denial of admission without written notice and procedural safeguards violated the Fourteenth Amendment.

There was a similar case considered by a federal district court in Missouri, (Sherer v. Waire, 457 F. Supp. 1039, 1978). Parents of a spina befida child sought an injunction directing the North Kansas City school district to provide catheteriztion service so that the child could attend

school in the regular classroom. The court did not reach the merits of the case but dismissed the complaint on procedural grounds including: (1) no private right of action under §504 and (2) failure to exhaust administrative remedies. After adverse rulings in the administrative proceedings, the parents have apparently dropped the matter.

Before closing this section, we should look briefly at some of the college cases. There have been two or three cases filed by deaf college students seeking to have the institution pay for interpreters for them. In South Carolina, although successful in the initial proceeding, on rehearing the court held that the student must exhaust administrative remedies before having standing to sue. (Barnes v. Converse College, 436 F. Supp. 635, 1977). Similarly, a federal district court granted a preliminary injunction ordering Western Carolina University to pay for an interpreter for a deaf graduate student working a masters degree in educational administration. The judge did not rule on the merits of the case but referred the matter to HEW for a ruling. The student was required to post a $3000 bond to pay for the interpreter in case HEW decides that Section 504 places no such obligation on the institution.

Section 504 makes no distinction between curricular and extracurricular activities in regard to the handicapped student right of participation. In 1977, claims pertaining to denial of equal opportunity in this area reached the courts.

In New York, the Commissioner of Education considered an appeal from parents of a deaf teenager whose request for transportation so that he could participate in the sports-activity program was denied. The hearing officer had ruled that the committee on the handicapped had no authority to consider requests for transportation to extra-curricular activities. The Commissioner

disagreed, citing New York statutes and §504. He ordered that the parent's request be reheard.

In another case, Kampmeier v. Nyquist, two junior high students, each with vision in only one eye, sought a preliminary injunction allowing them to participate in contact sports at school. One student has a congenital cataract in one eye. As of the beginning of the seventh grade in 1975 she was the best athlete in her class. Her parents provided her with protective glasses and announced their willingness to release the school and its employees from liability for any athletic injury to her eye. The other student has been virtually blind in one eye since he sustained an injury at age six. He participated in contact sports prior to the 1975-76 school year. On recommendation of the school physician, each student was prohibited from participating in contact sports solely because of lack of vision in one eye. The students sought relief under §504. The district court denied the motion and the plaintiffs appealed. The Second Circuit Court affirmed this ruling.

The parents were not deterred by this set back, continued their efforts in the state courts. In Kampmeier v. Harris (_N.Y.S. 2d_), the court ruled in 1978, that an impaired child cannot be excluded from contact sports unless following procedures of P.L. 94-142 and §504, it is determined that he/she is not "otherwise qualified."

(5) Right to Employment

Although only one 1977 case-of-record dealt directly with alleged discrimination against handicapped public school employees (Gurmankin v. Costanzo, 556 F. 2d 184), it is probably safe to predict a dramatic increase in litigation of this type in the months ahead. The impetus for this increase has been provided by §504, the HEW regulations issue May 4, 1977 and the government's announced policy of strict enforcement.

The Third Circuit Court heard appeals from the 1976 decision that ordered the school district to employ the plaintiff, a blind English teacher, and grant her seniority from the time of her first application. The lower court had ruled: (1) the board's refusal to permit blind persons to take employment examination violated the due process clause by creating an "irrebutable presumption" and (2) the board's violation of Title VII entitled her to the retroactive seniority award. The teacher's appeal claimed that her seniority should date from the time of her graduation from college and that the district continued to discriminate against her by offering her positions less desirable than those given to English teachers with less seniority. The school district's appeal challenged the court's authority to award seniority.

The appellate court upheld the lower court judgment. The court held also that the teacher was to be offered positions for which seniority qualified her even if currently employed teachers were "bumped" thereby. Finally, the court declined to consider the additional claims of equal protection and §504 violations.

Conclusion

We have examined a cross-section of current case law on rights of the handicapped. These decisions appear to produce more questions than answers. Of one thing we can be certain - handicapped persons are entitled to free, appropriate education in the least restrictive setting and nondiscriminatory consideration for employment. What recourse is available when these rights are denied? Perhaps the United States Supreme Court will provide some answers to this question when it rules in Southeastern Community College v. Davis (547 F. 2d 1158, 1978).

The Davis case resulted from the college's refusal to admit a deaf stu-

dent to its nursing program. The Fourth Circuit Court reversed a district court's decision for the college and the Supreme Court granted certiorari.

Before the court are key questions, some of which arose in the decisions we have discussed:

1. Is there a private right of action under §504?
2. Must administrative remedies be exhausted?
3. What is an "otherwise qualified" individual?

As we look ahead, a kind of backlash may begin to build. For example, a recent article in a Minneapolis newspaper questioned the proportion of the educational dollar that will be diverted to the education of the handicapped. In connection with provision of special services and prohibitions against disciplinary exclusion allegations of reverse discrimination are already being made. Also, the competency testing movement has resulted in claims of discrimination against the handicapped. These issued will probably crowd court dockets for many months to come.

Let me close with a quote:

> I have sought to point out the dangers which the principle of equality poses to the independence of man, because I firmly believe these dangers are most <u>formidable</u> as well as the least forseen . . . but I <u>do not think</u> that they are insurmountable.

This is another observation of de Tocqueville, made almost 150 years ago. Perhaps this very cautious optimism is what we need today.